Supreme Court, U.S.
FILED
MAY 8 1996

(2)

No. 95-1440

In the Supreme Court of the United States

OCTOBER TERM, 1995

PRESIDENT CONTAINER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's findings that:

(a) the Board's "contract bar" rule did not preclude an election in a unit consisting of petitioner's maintenance mechanics, boiler men, and garage mechanics (the mechanics unit);

(b) the mechanics unit was not an accretion to a unit consisting of petitioner's production employees; and

(c) the mechanics unit was an appropriate unit for the purposes of collective bargaining.

2. Whether the Board reasonably concluded that the Union, which had been certified by the Board as the representative of the employees in the mechanics unit, enjoyed an irrebuttable presumption of majority status for one year, and that the year would commence as of the date upon which petitioner began to bargain in good faith with the Union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is unpublished, but the judgment is noted at 74 F.3d 1227 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. A12-A18) is noted at 315 N.L.R.B. 164. The Acting Regional Director's decision and direction of election in the representation proceeding (Pet. App. A22-A26), and the Board's order denying petitioner's request for review of that decision (Pet. App. A21), are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on December 8, 1995. The petition for a writ of certiorari was filed on March 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures corrugated boxes at a plant in Moonachie, New Jersey. Pet. App. A3. At that facility, petitioner employs approximately 220 production employees (the production unit) and 14 maintenance mechanics, boiler men, and garage mechanics (the mechanics unit). *Id.* at A24. Since the late 1950s, petitioner has had a collective bargaining relationship with Production Workers Union, Local 148, AFL-CIO (Local 148). The most recent collective bargaining agreement between petitioner and Local 148 (the 1993 contract) was in effect from March 10, 1993, through March 9, 1996. The 1993 contract covered a unit consisting of "all of [petitioner's] employees, excluding office, clerical, supervisory, foremen, guards and watchmen." *Id.* at A3.

2. a. In April 1994, Local 825 (and several other locals) of the International Union of Operating Engineers, AFL-CIO (the Union) filed an election petition with the National Labor Relations Board (Board). The Union sought to represent the employees in the mechanics unit. Pet. App. A3, A24. After a hearing, the Board's Acting Regional Director (ARD) directed an election in that unit. *Id.* at A23.

The ARD rejected petitioner's contention that an election in the mechanics unit was barred by the 1993 contract under the Board's "contract bar" rule. Pet.

App. A24-A25.[1] The ARD determined that the employees in the mechanics unit were not covered by the 1993 contract. The ARD based that determination on his findings, *inter alia*, that (1) petitioner admitted that it had never bargained with Local 148 about the terms and conditions of employment of the mechanics unit; (2) Local 148 admitted that petitioner had never considered the mechanics unit to be part of the unit covered by the 1993 contract; and (3) the employees in the mechanics unit did not receive the wages, bonuses, or health and pension benefits prescribed in the 1993 contract. *Ibid.*

The ARD also rejected petitioner's contention that, even if the 1993 contract did not bar the election, no election should be held because the mechanics unit was an accretion to the production unit, which was already represented by Local 148. Pet. App. A26.[2]

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[1] Under the Board's "contract bar" rule, the Board generally will not conduct an election during the term of an existing collective bargaining agreement of up to three years' duration. See, *e.g.*, *Pick-Mt. Laurel Corp.* v. *NLRB*, 625 F.2d 476, 480 (3d Cir. 1980); see also *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972). An existing contract does not, of course, bar an election in a bargaining unit not covered by that contract. *Millbrook, Inc.*, 204 N.L.R.B. 1148, 1148 n.2 (1973).

[2] "[A]n accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate identity. Thus, they are properly governed by the larger group's [previous] choice of bargaining representative." Pet. App. A6 (quoting *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976)). The Board's policy is to strictly limit the application of the accretion doctrine, because employees that are added to an existing bargaining unit are denied a vote on their choice of bargaining repre-

The ARD explained that an accretion was inappropriate in view of "the lack of a history of collective bargaining for [the mechanics unit] employees, their special skills, their different terms and conditions of employment, and their lack of interchange." *Ibid.* Finally, the ARD found that the mechanics unit constituted an appropriate unit for the purposes of collective bargaining, "separate and apart from the production employees." *Ibid.*[3]

b. The Board denied petitioner's request for review of the ARD's decision, concluding that it "raise[d] no substantial issues warranting review." Pet. App. A21. The Board specifically noted its agreement with the ARD that, because the mechanics unit had been "historically excluded" from the unit represented by Local 148, it could not "be added by means of accretion." *Ibid.*

3. On September 1, 1994, the Board conducted an election in the mechanics unit. Pet. App. A4. The Union won the election by a vote of 8 to 2 and, on September 9, 1994, was certified by the Board as the bargaining representative of the employees in that

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sentative. *NLRB* v. *Security-Columbian Banknote Co.*, *supra*; *Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F.2d 844, 851 (D.C. Cir. 1979).

[3] The ARD found, among other things, that: (1) there was no job interchange between employees in the mechanics unit and the production unit; (2) there was little contact between the employees in the two units; (3) the units were separately supervised; (4) the mechanics unit employees possessed specialized skills and made use of their own hand tools in performing their work; (5) the mechanics unit was not covered by the 1993 contract; and (6) the mechanics unit employees negotiated their own wage rates, had separate health and retirement plans, and were subject to different vacation and sick-leave policies. Pet. App. A25-A26.

unit. *Id.* at A4, A14. On October 14, 1994, the Union asked petitioner to begin bargaining for a contract, but petitioner refused. *Id.* at A4. On October 21, 1994, a majority of the employees in the mechanics unit signed a petition stating that they no longer wished to be represented by the Union. *Ibid.*

On November 1, 1994, the Board's General Counsel issued an unfair labor practice complaint against petitioner, alleging that its refusal to bargain with the Union violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5). Pet. App. A4.[4] On the General Counsel's motion, the Board entered summary judgment against petitioner. *Id.* at A12-A18. The Board rejected petitioner's contention that its refusal to bargain with the Union was justified by the employee petition indicating a loss of majority support for the Union a week after the election. *Id.* at A13 (citing *Brooks* v. *NLRB*, 348 U.S. 96 (1954)).[5] To remedy petitioner's unfair

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[4] Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

[5] In *Brooks*, as in this case, the union won a Board-conducted election among the employees of a bargaining unit, but a week after the election, a majority of the employees in the bargaining unit signed a letter stating that they did not wish to be represented by the union. Relying on that letter, the

labor practice, the Board ordered it to bargain with the Union. Pet. App. A16. The Board specified that "we shall construe the initial period of the certification as beginning the date [petitioner] begins to bargain in good faith with the Union." *Ibid.* (citing, *inter alia*, *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)). Such a remedial order was necessary, the Board explained, "[t]o ensure that the employees are accorded the services of the selected bargaining agent for the period provided by law." Pet. App. A15-A16.

4. The court of appeals enforced the Board's order in an unpublished memorandum opinion. Pet. App. A2-A10. The court upheld the Board's determination that the election in the mechanics unit was not barred by petitioner's 1993 contract with Local 148. The court held that, "[d]espite the facial breadth of the unit set forth in [the 1993 contract], the record supports the Board's conclusion that the mechanics have never been parties to that Agreement." *Id.* at A5. The court also held that the Board's refusal to apply the accretion doctrine to add the mechanics unit to the unit represented by Local 148 was "certainly neither arbitrary nor unreasonable," inasmuch as "the evidence strongly supports the Board's conclusion that the mechanics were in fact excluded from the larger production workers' bargaining unit." *Id.* at

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employer refused to bargain with the union. 348 U.S. at 97. The Court upheld the Board's conclusion that the employer's refusal to bargain was an unfair labor practice. In doing so, the Court sustained the Board's rule that a certified union ordinarily enjoys an irrebuttable presumption of majority support for one year after its certification, and, accordingly, that such an employee petition does not relieve the employer of its duty to bargain with the union during the certification year. *Id.* at 98-104.

A7. Further, the court upheld, as supported by substantial evidence, the Board's finding that the mechanics unit constituted an appropriate unit for collective bargaining. *Id.* at A9.

The court rejected petitioner's argument that its refusal to bargain with the Union was justified by the employee petition indicating a lack of majority support for the union after the election. Pet. App. A9. That argument, the court explained, was "directly contrary" to this Court's decision in *Brooks* v. *NLRB*, 348 U.S. 96 (1954), which "approv[ed] the Board's rule requiring employers to bargain with a newly certified union for one year." Pet. App. A9. Finally, the court rejected petitioner's challenge to the Board's remedial order. The court explained that the order was "not a penalty" but was instead "the Board's standard remedy to ensure that a newly-certified union receives one year of actual bargaining from the date of its certification." *Id.* at A10. The court observed that, in similar contexts, the Board's remedy "has been approved and enforced by numerous courts." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. a. Petitioner contends (Pet. 10-11) that its 1993 contract with Local 148 barred the election sought by the Union in the mechanics unit. That is so, according to petitioner (Pet. 10), because the "plain language" of the 1993 contract, which purported to cover a unit comprising "all" of petitioner's employees, "cannot be questioned without running afoul of the

'contract bar rule.'" Petitioner misapprehends the rule.

As the court of appeals correctly explained, the Board's contract-bar rule does not preclude an election among employees who are not covered by the existing labor agreement. Pet. App. A5; see note 1, *supra*. Contrary to petitioner's contention, in determining whether the employees at issue are covered by an existing contract, the language of the contract is not always dispositive. Where, as here, the contract has not, in actual practice, been applied by the contracting parties to a group of employees, the contract does not bar an election among them. See, *e.g.*, *San Jose Motel*, 174 N.L.R.B. 1009, 1009-1010 (1969). Although petitioner contends (Pet. 11) that the court misconstrued the evidentiary record in sustaining the Board's finding that petitioner and Local 148 did not, in fact, apply the existing contract to the mechanics unit (see Pet. App. A5, A7, A24-A25), that contention raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner also errs in contending (Pet. 12-14) that, even if the employees in the mechanics unit were not covered by the 1993 contract, the Board should have found the mechanics unit to be an accretion to the production unit. The Board has long applied a rule that, "[w]hen a group [of employees] has in fact been excluded for a significant period of time from an existing * * * unit, the Board will not permit their accretion without an election or a showing of majority [support] among them." *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974); accord *United Parcel Service*, 303 N.L.R.B. 326, 326-327 (1991), enforced *sub nom. Teamsters Nat'l United Parcel*

Service Negotiating Comm. v. *NLRB*, 17 F.3d 1518 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). As the Second Circuit explained in *NLRB* v. *Stevens Ford, Inc.*, 773 F.2d 468, 474 (1985), the Board's rule protects against the risk that, after a group of employees has been excluded from an election in a unit, "strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status."[6]

The Board properly applied its rule in this case to conclude that the employees in the mechanics unit could not be added by accretion to the unit represented by Local 148 because they had been historically excluded from the larger unit. Pet. App. A21.

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[6] To determine whether a group of employees may be added to an existing bargaining unit under the accretion doctrine, the Board ordinarily applies a community of interest test. That test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees." *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982). Under the Board's *Laconia Shoe* rule, however, the Board does not apply the community of interest test where, as here, the employees at issue have been historically excluded from the existing bargaining unit. In such circumstances, "[i]t is the fact of historical exclusion that is determinative" of the accretion question. *United Parcel Service*, 303 N.L.R.B. 326, 327 (1991), enforced *sub nom. Teamsters Nat'l United Parcel Service Negotiating Comm.* v. *NLRB*, 17 F.3d 1518 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). Petitioner did not directly challenge the Board's *Laconia Shoe* rule in this proceeding, and petitioner's suggestion (Pet. 12) that the Board should have applied a community of interest test, rather than the *Laconia Shoe* rule, simply misapprehends Board precedent.

Although petitioner contends (Pet. 13) that the court "clearly 'misapprehended or grossly misapplied'" the substantial evidence test in sustaining the Board's finding (see Pet. App. A7), that contention does not merit this Court's attention, for the record belies petitioner's claim. See *id.* at A5, A7, A21, A24-A25.[7]

c. Petitioner further contends (Pet. 15-16) that the Board's determination that the mechanics unit constituted an appropriate unit for the purposes of collective bargaining was "unreasonable and arbitrary." In particular, petitioner asserts (*ibid.*) that "[c]ritically missing from the analysis is substantial evidence that the mechanics share a community of interest, *inter sese*, as opposed to their interest as members of the larger community of employees of [petitioner]." The court of appeals, however, rejected that contention, holding instead that the Board's unit finding was supported by substantial evidence. Pet. App. A9. The court's conclusion raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, *supra*.

In any event, the court's assessment of the evidentiary record was correct. As the court explained, that record demonstrated that there were "significant differences in the roles, skills, work conditions and bargaining history between mechanics and production employees" (Pet. App. A7); that, "unlike most produc-

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[7] Petitioner errs in asserting (Pet. 14) that the Board's accretion ruling represents an unexplained "departure" from the Board's policy of "reject[ing] severance of crafts from a plant-wide unit." The policy to which petitioner refers "addresses the severing of crafts from an existing larger unit which included the craft employees." Pet. App. A9. That policy is inapposite here, for the mechanics unit employees have never been part of the larger unit represented by Local 148. *Id.* at A9, A21.

tion employees, mechanics require prior mechanical skills or experience, use and often purchase their own hand tools, operate [petitioner's] larger machine tools, and wear distinctive uniforms (*id.* at A8); and that "the mechanics * * * share the common function of repairing and maintaining [petitioner's] machinery and equipment [and] share a common bargaining history and similar employment benefits" (*ibid.*). On those facts, the court properly sustained the Board's unit determination. See *South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805 (1976) ("[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed[.]") (internal quotation marks omitted). Moreover, the Board's unit determination in this case, while highly fact-bound, accords with other Board decisions finding a separate mechanics unit to be appropriate for bargaining. See, *e.g.*, *Dodge City of Wauwatosa, Inc.*, 282 N.L.R.B. 459 (1986) (unit of automobile repair mechanics appropriate, separate from other employees in employer's service department); cf. *Laidlaw Waste Systems, Inc.* v. *NLRB*, 934 F.2d 898 (7th Cir. 1991) (upholding unit of truck drivers, separate from truck mechanics).

2. Contrary to petitioner's contention (Pet. 17-18), the court of appeals correctly relied on *Brooks* v. *NLRB*, 348 U.S. 96 (1954), in holding (Pet. App. A9) that petitioner's refusal to bargain with the Union was not justified by its receipt, one week after the Union won the election, of a petition signed by the majority of the employees in the bargaining unit indicating that they did not wish to be represented by the Union. The Court in *Brooks* came to the same conclusion on virtually identical facts. 348 U.S. at 97-

104; see note 5, *supra*. In doing so, this Court upheld the Board's rule according a conclusive presumption of majority status to a union for the year following its election and its certification.

Petitioner suggests (Pet. 17) that *Brooks* is inapplicable here because its 1993 contract with Local 148 barred an election in the mechanics unit, and that Local 148, rather than the Union, was therefore entitled to the conclusive presumption of majority status. That argument rests on the premise that the 1993 contract covered the mechanics unit, a premise that, as discussed above, was correctly rejected by the Board and the court of appeals. Pet. App. A5, A24-A25; see discussion p. 8, *supra*.

Finally, petitioner contends (Pet. 19) that this Court should modify *Brooks* and the remedial policy enunciated by the Board in *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962), "to exclude from its application a situation where an employer in good faith fails to bargain with a unit, the putative members of which are, *prima facie*, covered by the terms of an existing collective bargaining agreement with another union." That situation, however, is not presented in this case. Petitioner's refusal to bargain with the Union was not grounded on a "good faith" belief that the employees in the mechanics unit were covered by the 1993 contract; rather, as the Board determined in a finding sustained by the court of appeals, petitioner and Local 148 in actual practice did not regard or treat the mechanics unit as subject to the 1993 contract. Pet. App. A5, A7, A24-A25. Moreover, as the court of appeals correctly determined (*id.* at A10), the Board's policy of tolling the one-year period during which petitioner must bargain with the Union until the date it begins to bargain in good faith with the Union does

not unfairly penalize petitioner for obtaining judicial review of the Board's unit determination; rather, it merely insures that a newly-certified union receives one year of actual bargaining after certification. The Board, whose remedial views "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), acted well within its discretion in adopting that remedial policy. Cf. *Brooks*, 348 U.S. at 104.[8]

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[8] Petitioner misstates the law in asserting (Pet. 20) that "[a]n employer may refuse to bargain with a certified union when it reasonably believes, in good faith, that the union has lost the majority support of the designated unit." With exceptions not relevant here, a certified union's presumption of majority status is irrebuttable during the certification year. *Brooks* v. *NLRB*, *supra*. It is only *after* the certification year ends that an employer may, in the absence of a collective bargaining agreement, refuse to bargain with a union based on a good faith doubt about the union's majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). Because petitioner's refusal to bargain occurred during the certification year, the "good faith doubt" defense was unavailable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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